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IN THE SUPREME COURT OF THE UNITED STATES

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BUCK DOE, ET AL., :

Petitioner :

v. : No. 02-1377

ELAINE L. CHAO, SECRETARY :

OF LABOR :

- - - - -X

Washington, D.C.

Wednesday, December 3, 2003

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:03 a.m.

APPEARANCES:

JACK W. CAMPBELL, IV, ESQ., Washington, D.C.; on behalf of  
the Petitioner.

MALCOLM L. STEWART, ESQ., Assistant Solicitor General,  
Department of Justice, Washington, D.C.; on behalf of  
the Respondent.

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument  
next in No. 02-1377, Buck Doe v. Elaine Chao.

Mr. Campbell.

ORAL ARGUMENT OF JACK W. CAMPBELL, IV  
ON BEHALF OF THE PETITIONER

MR. CAMPBELL: Mr. Chief Justice, and may it  
please the Court:

In this case, it is undisputed that petitioner  
Buck Doe suffered an adverse effect, the emotional  
distress typical of a privacy invasion caused by the  
Department of Labor's intentional and willful violation of  
the Privacy Act. The only question is whether under these  
circumstances, petitioner is entitled to recover the  
Privacy Act's modest \$1,000 statutory damages remedy.

QUESTION: Before we go further, could you help  
me out on one thing? You spoke of the modest \$1,000  
recovery. The argument is made on the other side that, in  
fact, it would be \$1,000 for every publication in this  
case, for example, for every caption of a - of - of an  
order that went out, to everyone to whom that order was  
sent, so that it would not be \$1,000, it would be many,  
many thousands. Is that the proper construction of the  
statute?

1           MR. CAMPBELL: The answer to that is no, Justice  
2     Souter, and let me answer that in at least two ways.  
3     First of all, the District of Columbia Circuit has already  
4     held that the number of - that the \$1,000 is key to each  
5     individual and not to the number of disclosures. For  
6     example, in the Tomasello case in the D.C. Circuit, there  
7     was a simultaneous disclosure of information about a  
8     single individual to some 4,000 recipients. That court  
9     held -

10           QUESTION: Okay.

11           MR. CAMPBELL: - and I think correctly, that that  
12     would be considered one disclosure under the act and,  
13     thus, the individual would be entitled to only a single  
14     \$1,000 recovery.

15           QUESTION: What if - what if there had been an  
16     initial disclosure and he had protested it? He said,  
17     you're violating the statute when you do this and they did  
18     it again. Would that be a separate offense?

19           MR. CAMPBELL: That's a closer question - it -  
20     because then you - you've got the - the temporal  
21     separation that did not exist in the Tomasello case.

22           QUESTION: Yeah, but you'd have temporal  
23     separation if there were 10 pleadings over a period of 10  
24     months.

25           MR. CAMPBELL: But -

1           QUESTION: And I take it in that case you're  
2   saying, no, there would still just be a - a - a one  
3   violation and - and the maximum recovery, at least under  
4   this provision, would be 1,000.

5           MR. CAMPBELL: I - I - I think that's right,  
6   Justice Souter, and I want to make clear too that for each  
7   of those disclosures you're describing, there would have  
8   to be an adverse effect described and - and a causation  
9   element met in each of those in any case before you even  
10  got to the question.

11          QUESTION: But suppose the IRS -

12          QUESTION: But that's so easy to establish, as  
13  shown here. I mean, it bothers me that somebody else  
14  knows my Social Security number. You don't think that's a  
15  realistic reason for not assuming application of the  
16  statute, do you?

17          MR. CAMPBELL: I - if I understand your question,  
18  Justice O'Connor, the answer is, yes, there is a real harm  
19  suffered here, and adverse effect is not a meaningless  
20  standard. And in this case, you don't just have a  
21  situation in which Buck Doe - it's obviously a pseudonym -  
22  just alleges, I was harmed. This is a case in which he  
23  submitted an affidavit, and more importantly, testified in  
24  open court as to the severity and veracity of his  
25  emotional -

1 QUESTION: Well, but wouldn't -

2 MR. CAMPBELL: - and was cross-examined.

3 QUESTION: - wouldn't every person who wanted to  
4 make such a claim make similar allegations? Is a class  
5 action a reasonable possibility in a case like this?

6 MR. CAMPBELL: Let me answer both parts of your  
7 question. As to the first part, I - I don't think we can  
8 presume that plaintiffs are going to make up an adverse  
9 effect. They are certainly under the obligations to  
10 testify truthfully, and in this case, the Government had  
11 every opportunity that - to - and did cross-examine Mr.  
12 Doe as to the veracity of his adverse effect. The  
13 magistrate found as a matter of fact he did suffer an  
14 adverse effect, the district court adopted it and the  
15 Government never appealed that finding, so whatever  
16 arguments they have at this point are gone.

17 Second part of your question, class actions.  
18 That's certainly the parade of horrors that the  
19 Government is trotting out here, and I think perhaps,  
20 Justice Souter, may go more - more directly to your  
21 question as well. The answer is no. Even if an  
22 individual who has suffered an adverse effect caused by an  
23 intentional or willful violation of the act is entitled to  
24 a statutory damages award without being required to  
25 quantify actual damages.

1           There are still at least two individualized  
2   issues that will exist in every case. One is the pleading  
3   and proof of the adverse effect, which necessarily may  
4   vary among different plaintiffs. Second is the causation,  
5   and particularly in the causation question, Justice  
6   O'Connor, this is not a - a standard that - that  
7   plaintiffs lightly leap over.

8           In fact, there are a number of cases, one of  
9   which is the Oroquoia decision of the First Circuit, which  
10   was handed down while this petition was pending, noted  
11   that in cases where the - the adverse effect alleged is a  
12   - an emotional distress-type problem, you may well run  
13   into causation problems. There could be any number of  
14   other stressors in this person's life.

15           QUESTION: Let's assume that somebody wrongfully  
16   and intentionally releases Social Security numbers, you  
17   know, just - just a whole bunch of Social Security numbers  
18   of their - their entire list. They sell their - their  
19   list to somebody. Why wouldn't that be a perfectly valid  
20   class action? Every one of them has had the adverse  
21   effect of having his Social Security number out there, and  
22   every one of them has this same adverse effect, which is  
23   the, I don't know, the trauma of knowing that - that your  
24   - your Social Security number is floating out there where  
25   anybody can use it. Why wouldn't that be a perfectly good

1 class action?

2 MR. CAMPBELL: Well, I - I think that the example  
3 you give, the problem remains, particularly one of  
4 causation. Some folks may not have an adverse effect,  
5 they may not be concerned, I think, particularly if you're  
6 describing a case in which it's only the number that's  
7 released but the number's not linked to a name. I think  
8 in those cases you might have difficulty.

9 QUESTION: Those numbers are - are linked to  
10 names.

11 MR. CAMPBELL: I'd still go back to the - there's  
12 a causation problem. If - if you're going to talk - that  
13 is an individualized issue. Now, I -

14 QUESTION: May I ask, with respect to that, you  
15 brought this case. I mean, you tried to get it certified  
16 as a class action and you were unsuccessful. So I - I  
17 hear you telling this Court, we were way off-base in  
18 attempting to bring this as a class action because the  
19 adverse effect is different for each person. So you're  
20 giving up on your first loss. I mean, there are other  
21 circuits that might say, yeah, why not class action?

22 MR. CAMPBELL: I don't - I don't - I don't  
23 contend that there aren't arguments to be made. What I am  
24 stating here is that there are some very strong -

25 QUESTION: But you say you lost fair and square,



1 and now you've seen the error of your ways?

2 MR. CAMPBELL: Well, we lost fair and square and  
3 I - and I want to point out too, I want to give another  
4 example of a case, and it's one of the cases that the  
5 Government cites in its brief as the example of - of this  
6 - this problem, and that's the Schmidt case that is  
7 pending in the Western District of Wisconsin, which  
8 involves a putative class action against the Veterans  
9 Administration. In that case, the Western District of  
10 Wisconsin held, and this has been since cert was granted  
11 in this case, held that, if you prove an adverse effect  
12 caused by an intentional, willful violation of the act,  
13 you are entitled to statutory damages of \$1,000.  
14 Nonetheless, that district court refused to certify a  
15 class on precisely the grounds that I am describing to you  
16 today.

17 So is it conceivable there could be a class  
18 action in a case? Yes, it's conceivable, and I do -

19 QUESTION: But even if they're not class actions,  
20 I have, I think, the same problem people have expressed.  
21 In Massachusetts, we put our Social Security number on our  
22 driver's license. I have it right in my pocket. I show  
23 it 10 million times a day, or however many. So suppose  
24 that, you know, the IRS releases - California wants to do  
25 the same thing. They have 35 million drivers, and the IRS

1 sends them a list so they can check it out, or the Social  
2 Security Administration does that and, my God, there's 35  
3 million lawsuits, \$1,000 each, that's only 35 billion.  
4 Suppose they do it nationwide. There's 200 billion, and  
5 that's only Social Security numbers. All you have to do  
6 is read through these 14 pages of fine print of the  
7 requirements of the Privacy Act, certain days have to be  
8 met, certain deadlines, and it's very easy to imagine  
9 bankruptcy in the Federal Treasury.

10 All right. So, I mean, you know, trillions,  
11 it's easy to see that. I can make up hypotheticals, which  
12 I'll spare you, but you see where I'm going, because what  
13 I want is that is the horrible. And when I read the  
14 horrible, I think, my God, they're right. All right.  
15 Now, you tell me why they're not.

16 MR. CAMPBELL: In the hypothetical that you're  
17 proposing, Justice Breyer, I think there are several  
18 answers.

19 QUESTION: And just make up, you know, it's easy  
20 for both of us to make up a lot.

21 MR. CAMPBELL: Sure.

22 QUESTION: I want to know what are the  
23 protections if you win against generating millions and  
24 millions of lawsuits with billions of dollars.

25 MR. CAMPBELL: In - in the hypotheticals that

1     you've described, if I could take those on their terms  
2     first. It's very likely that one of the exceptions to the  
3     Privacy Act disclosure is going to apply usual - if it's  
4     the case that - that this is a working relationship  
5     between the Federal Government and various state  
6     governments and the like, that may well fall within the  
7     usual use.

8             There are a number of these exceptions listed,  
9     so certainly you have to look to those first. Have to go  
10    - go back to - this would have to be intentionally  
11    wrongful conduct by the Government -

12            QUESTION: Well, yeah, I can't imagine any  
13    government agency that takes place that isn't intentional.  
14    You always have people intending to do what they do in the  
15    Government.

16            MR. CAMPBELL: Well -

17            QUESTION: Nobody released these - nobody -  
18    nobody puts anything on a piece of paper, releases it,  
19    isn't intentional.

20            MR. CAMPBELL: Certainly the - the intent to  
21    release the - the information would be correct, but that's  
22    not the same as to say there was an intent to violate the  
23    Privacy Act.

24            QUESTION: Ah, in other words, in order to  
25    recover - now, that's an important point to me - in order

1 to recover, the plaintiff has to show that the government  
2 individuals or the agency not only intended to do what did  
3 violate the act, but they intended that what they did  
4 would violate the Act. They knew about the - that's  
5 willful, it's like they knew about the legal obligation  
6 and they intentionally violated it.

7 MR. CAMPBELL: That's correct, Justice

8 QUESTION: Well, then, how did you ever win this  
9 one?

10 QUESTION: That's - that's - that's a very  
11 strong -

12 QUESTION: Yeah, very strong.

13 QUESTION: - instruction. Ordinary - ignorance  
14 of the law is - is no defense, and there are all sorts of  
15 statutes that use the word willful, which simply means  
16 that you intended to do the act that you did, not that you  
17 knew it violated the law.

18 MR. CAMPBELL: Well, in - in this case - I - the  
19 consistent constructions of - of the Privacy Act is it's -  
20 it's greater than gross negligence. It - it necessarily  
21 encompasses more than just I intended to do something.  
22 It's that I - I willfully blind to my obligations in the -

23 QUESTION: Well, how about this case? How - how  
24 was that shown in this case?

25 MR. CAMPBELL: In pages - if I could point the

1 Court to pages - bear with me for one moment - pages 90 -  
2 96 -

3 QUESTION: This was a - this was a distribution  
4 by administrative law judges -

5 MR. CAMPBELL: That's correct.

6 QUESTION: - of hearing notices and decisions?

7 MR. CAMPBELL: That - among other things. The  
8 answer is yes, Justice O'Connor. On pages 96A to 97A of  
9 the petitioner's appendix, there is the description of the  
10 magistrate judge's finding that there was a willful  
11 violation of the Privacy Act here and that there was a -  
12 there was no attempt even - no even attempt to comply with  
13 the act's requirements, and I - I would point -

14 QUESTION: But to say there's no intent to comply  
15 isn't the same thing as saying that you knew you were  
16 violating the act when you acted.

17 MR. CAMPBELL: Well, let me amend my answer in  
18 this way, Mr. Chief Justice. A willful ignorance - a  
19 willful ignoring of the act's requirements would qualify  
20 as a willful - and I - I want to -

21 QUESTION: Well, how can you - how can you  
22 willfully ignore an act's requirements?

23 MR. CAMPBELL: Well, the Department of Labor was  
24 well aware of what the Privacy Act's requirements were and  
25 made no attempt to get the administrative law judges to

1     comply, and - and I want to go back here this - to one of  
2     the answers I gave with respect to your adverse effect  
3     questions. This issue was decided by the magistrate  
4     judge, adopted by the district court, and this was never  
5     appealed by the Federal Government.

6             QUESTION: Well, but our concern -

7             QUESTION: We're concerned here, Justice Breyer  
8     and I guess - what is going to happen if we rule in your  
9     favor? That will probably not result in any benefit for  
10    the Government on this ground, but are we just opening a  
11    can of worms or is - by ruling in your favor?

12            MR. CAMPBELL: The answer is no, and - and  
13    certainly I acknowledge, Mr. Chief Justice, and Justice  
14    Souter and Justice Breyer, that in future cases there  
15    might well be a lot more time spent litigating the issues  
16    of whether there was an adverse - truly an adverse effect  
17    and whether - and - and whether the - the violation was  
18    truly intentional and willful. But I want to -

19            QUESTION: Okay, but can - can we just go back to  
20    that for a second?

21            MR. CAMPBELL: Sure.

22            QUESTION: Because we've been concentrating on  
23    willful, and you say, well, willful requires a very high  
24    standard. As - as you just indicated in your answers, the  
25    statute doesn't require willful. It requires intentional

1 or willful.

2 MR. CAMPBELL: Or willful.

3 QUESTION: And it would be even more remarkable  
4 to construe the - the term intentional as requiring  
5 conscious disregard of - of a known statutory obligation.

6 MR. CAMPBELL: Let - let me answer this way in  
7 response, and maybe it will - will help ease the concerns.  
8 For 22 years, the interpretation of the Privacy Act that  
9 petitioner offers today has been the law of the land, and  
10 in that -

11 QUESTION: Do you have a case that says  
12 intentional standing alone must be construed to include  
13 this conscious disregard of a - of a known legal  
14 provision?

15 MR. CAMPBELL: I can't cite a specific case for  
16 that proposition, Justice Souter, but I again go back to  
17 we were talking about intentional or willful, it's a high  
18 burden under any concept of what intentional or willful  
19 will be, and for years, for 22 years, from 1975 to, at the  
20 earliest 1997, when the Sixth Circuit decided the Reno  
21 case, the interpretation that I am offering this Court is  
22 the one that the courts of appeals had unanimously  
23 adopted, and never in those 22 years had the kind of  
24 parade of horrors that the Government posits in this  
25 case materialize.

1           Indeed, if anything, if you look - there is a -  
2   a reporter that lists every single case decided under the  
3   Privacy Act since 1975.

4           QUESTION: But have any of those cases involved  
5   disclosure of Social Security numbers?

6           MR. CAMPBELL: None that I recall. That seems to  
7   be a relatively new -

8           QUESTION: See, this seems to me a particular  
9   kind of disclosure that might happen over and over again  
10  in a very casual way.

11          MR. CAMPBELL: I - I submit, Justice Stevens, if  
12  it happens in a casual way, that's not going to provide  
13  anyone with a cause of action.

14          QUESTION: Well, pursuant to a policy such as  
15  they had here of that's the way they use to identify -  
16  driver's license they use it on, the Holiday Inn uses it  
17  for their social - all sorts of people use Social Security  
18  number for another purpose.

19          MR. CAMPBELL: That's true. It's certainly true  
20  that Social Security numbers are used for other purposes.  
21  But what is clear from this statute is that Congress was  
22  specifically focused on concerns about Social Security  
23  numbers being disclosed and the adverse effects that can  
24  result from that.

25          QUESTION: That - that may be true. What's



1     bothering me, which may be the same thing, as Justice  
2     Stevens says, is that I might have thought that a Labor  
3     Department official could reasonably think, I have a list  
4     of 50,000 people here, several are named John Smith, I  
5     want to be sure we get the right ones so I'll put the  
6     Social Security number as identifier. That doesn't on its  
7     - on its face seem like such an unreasonable thing to  
8     think, even if it's wrong.

9             And - and yet we have here a finding that not  
10    only is it wrong, but that it's intentional and willful,  
11    and that's what brings up the problem you come to argue,  
12    and I don't know how to deal with it, because I think,  
13    well, if this statute, intentional, willful really means  
14    the tough thing that you say, well, then it'll work, then  
15    you're right, there won't be a horrible. But then I see  
16    this case, which seems to me to stand for the proposition  
17    that that tough standard isn't being applied. And then I  
18    think, my goodness, you're opening the door to the  
19    horribles and - and I don't know how to do it because the  
20    other part isn't being argued. That's my honest dilemma.  
21    I put it to you.

22            MR. CAMPBELL: I - I - I under - I well  
23    understand your dilemma, Justice Breyer, and I again go  
24    back to, I don't doubt if this - if the statute is given  
25    its natural reading, that the \$1,000 statutory damages is

1 available to those to whom the United States shall be  
2 liable, there will be an awful lot more traction, a lot  
3 more fighting over the adverse effect and the particular  
4 circumstances that would rise to the level of an  
5 intentional or willful violation in the future.

6 QUESTION: Mr. Campbell -

7 MR. CAMPBELL: That's simply not an issue here.

8 QUESTION: Really what - what Justice Breyer is  
9 saying is - is that this issue of willfulness or not is  
10 not in the case and we wish it were, because the answer to  
11 that is important. Could we talk a little bit about what  
12 is in the case?

13 MR. CAMPBELL: Yes, yes, Justice Scalia, thank  
14 you.

15 QUESTION: Can - can you tell me what - I - I  
16 really have trouble understanding how there can be an  
17 adverse effect without actual damage. That's a very  
18 strange line. I mean, in - in the Administrative  
19 Procedure Act, you talk about any person adversely  
20 affected or aggrieved, and that's a person who suffered  
21 damage. It seems very strange for Congress to use  
22 language that - that sets up two different categories,  
23 adverse effect on the one hand, and actual damage on the  
24 other. When - when is there an adverse effect without  
25 actual damage?

1           MR. CAMPBELL: I think there frequently can be an  
2   - an emotional harm that is not quantifiable in dollar  
3   terms -

4           QUESTION: Well -

5           MR. CAMPBELL: - and that's very common in the  
6   law.

7           QUESTION: That doesn't mean that it's not  
8   actual. It just means that it's hard to quantify, but  
9   you've had the emotional harm. Why isn't that an - why  
10   isn't that actual - actual harm?

11          MR. CAMPBELL: I - I want - I - I agree with you  
12   that that is an actual harm, and I think that's one of the  
13   things that the Government is - is trying to cloud the  
14   issue a bit in this case, and that is to equate actual  
15   damages and actual harm. I submit they are different,  
16   that the - in - in interpreting the statute, the  
17   deliberate use of a term adverse effect and the deliberate  
18   use of a term actual damages, those must be given  
19   different meanings.

20          QUESTION: Well, do you agree that, or do you  
21   contend that adverse effect include - includes emotional  
22   distress and that you have to show something like  
23   emotional distress before there is an adverse effect?

24          MR. CAMPBELL: Yes, yes indeed, Justice Kennedy,  
25   and that is indeed the unanimous position of the Federal

1 courts on that question.

2 QUESTION: What - what do you say about the  
3 position of the - which I understood the circuit to be  
4 taking that, on the assumption that there - there was some  
5 emotional damage, at least in the sense that the - the man  
6 said, I was very upset when I heard that the number was  
7 out. Assuming that, I thought the Fourth Circuit was  
8 saying, there is a category of harm that is generally non-  
9 compensable in the law, and we assume it ought to be non-  
10 compensable here, and that category is emotional damage,  
11 which has no physical manifestation. And the general  
12 policy behind that is, we don't allow generally, tort law  
13 doesn't allow recovery there because it's too easy to  
14 fake.

15 And the Fourth Circuit, I thought, was saying,  
16 you know, whether you're talking about damage or whether  
17 you're talking about effect, this is an effect that the  
18 law simply doesn't generally recognize and it shouldn't be  
19 recognized here. That's a different issue from whether it  
20 can be quantified or not. What the circuit was saying is,  
21 you don't even get to the point of proving quantification.  
22 What - what is your response to that?

23 MR. CAMPBELL: If that is indeed what the Fourth  
24 Circuit's position is, it's squarely wrong. At common law  
25 and intentional torts generally, and in privacy torts

1 specifically, this type of harm is compensable in some at  
2 least minimal way, even if it cannot be quantified, and I  
3 think that's why -

4 QUESTION: What about - even if there is no  
5 physical manifestation?

6 MR. CAMPBELL: Even if there is no physical  
7 manifestation. Indeed, I submit, Justice Souter, it's -  
8 there's nothing surprising about the overall remedial  
9 scheme here, because it does track what happened at common  
10 law and intentional torts and with respect to intentional  
11 privacy torts. In fact, the Privacy Act is more strict  
12 even than what was required at common law. At common law,  
13 even no damage at all, no - I'm sorry - I don't - I don't  
14 want to get back into the confusion over the terms. Even  
15 if there was no harm at all, there would be still be some  
16 at least minimal award, recognizing the invasion.

17 QUESTION: Sure, because privacy -

18 MR. CAMPBELL: Here you have to put -

19 QUESTION: - I mean, in your - I understand your  
20 privacy argument, but that's because the invasion of  
21 privacy or the infringement of privacy is regarded simply  
22 as - as injury per se, and - and I thought the circuit was  
23 saying, that's not what we're dealing with here. But  
24 you're saying, what, privacy is privacy and - and -

25 MR. CAMPBELL: Well, I - I want to -

1                   QUESTION: But it's - but if that is so, then let  
2 me just get to my question. If that is so, why did the  
3 statute go into speaking of actual damage at all? Why  
4 didn't the statute simply say, if they invade the privacy  
5 by publishing something they shouldn't publish, you get at  
6 least \$1,000 regardless. But that's not what it said.  
7 It's keyed it to actual damage, and it said, if there's  
8 actual damage, the person entitled to recovery for actual  
9 damage gets at least 1,000, which is something quite  
10 different. It does not take the position that it's a per  
11 se compensable harm.

12                  MR. CAMPBELL: Well, I - I, of course, disagree  
13 with your characterization of what subsection (A) in fact  
14 says, but let me go back to first part of the answer. We  
15 are talking about an adverse effect, so we are talking  
16 about having to prove a harm. We're not just talking  
17 about the ability to vindicate a privacy interest in the  
18 abstract. You can certainly do that at common law, and  
19 Congress could have written a statute that allowed you to  
20 do that under the Privacy Act. It didn't. It did at  
21 least require that you demonstrate an adverse effect and  
22 real harm.

23                  QUESTION: And what - can - can you - and this  
24 goes back to Justice Scalia's initial question, what is  
25 the difference in adverse effect and actual damage?

1           MR. CAMPBELL: The difference is the ability to  
2 quantify the harm in some dollar amount.

3           QUESTION: Yes, but if that's - if that's the  
4 case, I don't see why the risk of being subjected to  
5 identity theft would be increased by the disclosure of  
6 your Social Security number, and if that's true, and I  
7 think some people could prove the risk is increased, that  
8 would be true of every release of every Social Security  
9 number.

10          MR. CAMPBELL: I - I - I would certainly agree  
11 that there is a real risk of identity theft any time  
12 there's a disclosure of a Social Security number,  
13 particularly as here when it's linked directly with the  
14 name.

15          QUESTION: So does it not necessarily follow that  
16 every one of those releases causes an adverse effect?

17          MR. CAMPBELL: I don't think it is. There could  
18 be - there could be people who aren't bothered by that or  
19 who don't share that fear.

20          QUESTION: Whether they're bothered about it or  
21 not, they're - they have an increased risk, just if you  
22 increase your risk of death, maybe they're not aware of  
23 it, but it's still an adverse effect.

24          MR. CAMPBELL: Well, I do not contend that the  
25 Privacy Act is a statute that - that compensates in some

1 way for merely increased risk. I think that does go back  
2 to the adverse effect here. You do have to have some sort  
3 of harm that actualizes, and here it did actualize in his  
4 real emotional distress about the disclosure.

5 QUESTION: Well, I mean, that doesn't answer it.  
6 The harm does actualize, as you say it, once the Social  
7 Security number is released, the harm actualizes. You're  
8 at greater risk than you were before. That's - that's  
9 actual as can be.

10 MR. CAMPBELL: I can't support that  
11 interpretation of the act, although candidly, it - it  
12 probably would be a better one for plaintiffs in the - in  
13 the run-of-the-mine case. And the reason is this: If the  
14 - if the disclosure itself is the adverse effect, what  
15 happens is that the causation language in subsection  
16 (g)(1)(D) becomes superfluous, and I am being careful to  
17 the - the text here -

18 QUESTION: Well, it's superfluous with respect to  
19 Social Security numbers, but the statute covers a whole  
20 range of activities other than this particular case.

21 MR. CAMPBELL: Absolutely, Justice Stevens, and I  
22 - I - but I'm not sure - I - I don't think the answer is  
23 that it would be just superfluous with respect to Social  
24 Security numbers. In every case, if the release of any  
25 information, let's say it's a medical record, not a Social



1 Security number. If the release itself is the adverse  
2 effect, the problem is that does not - that does not hew  
3 to the - the causation language contained in subsection  
4 (g)(1)(D).

5 QUESTION: Well, the release of medical  
6 information doesn't necessarily increase the risk of any  
7 particular harm. But this particular information does  
8 increase the risk of an identity theft for everybody.

9 MR. CAMPBELL: It does increase that - it does  
10 increase the risk -

11 QUESTION: It is not true if you say, well,  
12 you're taking aspirin three times a day or something like  
13 that. So what? But this is not a so-what situation.

14 MR. CAMPBELL: No, it's a - I agree, Justice  
15 Stevens. It does increase the risk, but - but for some  
16 people, that increased risk may not cause them an adverse  
17 effect, the personal adverse effect.

18 I would like to reserve the remainder of my time  
19 for rebuttal, if I may.

20 QUESTION: Very well, Mr. Campbell.

21 Mr. Stewart, we'll hear from you.

22 ORAL ARGUMENT OF MALCOLM L. STEWART

23 ON BEHALF OF THE RESPONDENT

24 MR. STEWART: Mr. Chief Justice, and may it  
25 please the Court:

1           I'd like to begin by discussing the distinction  
2   as we see it between the terms adverse effect and actual  
3   damages. And as one of Justice Scalia's questions  
4   indicate, the term adverse effect is not one that  
5   originated in the Privacy Act. It's - it's a term of art.  
6   The general judicial review provision of the  
7   Administrative Procedure Act grants a right of action to  
8   persons adversely affected or aggrieved, and I don't think  
9   it's the case that a plaintiff under the APA needs to show  
10   that he has suffered the type of harm that would  
11   ordinarily be compensable in damages.

12           Because the APA excludes money damages as an  
13   available item of relief, the typical inquiry in - under  
14   the APA in determining whether a plaintiff has standing is  
15   whether he is likely to suffer harm in the future, not  
16   whether he has been harmed in the past. And if we had a  
17   hypothetical APA suit, for instance, challenging an  
18   ongoing or imminent program by which the Government  
19   intended to release Social Security numbers, and a  
20   particular plaintiff could show there is a likelihood that  
21   my own Social Security number will be released in the near  
22   future, I think that would be sufficient in and of itself  
23   to establish that that person was adversely affected or  
24   aggrieved within the meaning of the act.

25           He would be suffering a - a violation of his

1 legal right to have information about him maintained  
2 within the Government's files and he would also suffer at  
3 least an increased risk of identity theft. That would be  
4 enough to get him into the - into court to seek  
5 prospective, injunctive, or declaratory relief. But those  
6 certainly wouldn't be the types of harms that would  
7 ordinarily be compensable in damages.

8 QUESTION: Well, but that - but that's not the  
9 question. It - it - the point is it's - it's not only  
10 enough to get him into court, which is what it is said  
11 adverse effect does here, it is enough under the APA to  
12 give him judgment. He wins.

13 MR. STEWART: He wins -

14 QUESTION: It - it is enough to give - to make  
15 his claim a valid - a valid claim.

16 MR. STEWART: He - he wins but -

17 QUESTION: And the reason he can't get money  
18 damages has nothing to do with the magic words, adversely  
19 affected. It has to do with simply the fact that money  
20 damages are not available under the APA.

21 MR. STEWART: But -

22 QUESTION: But he wins under the APA.

23 MR. STEWART: But the fact that a plaintiff can  
24 win under the APA and, in our view, can't win under the  
25 damages provision of the Privacy Act simply reflects what

1 is implicit in the APA's exclusion of money damages as an  
2 available item of relief, namely the view that agency  
3 action should ordinarily be reviewable in court, and  
4 plaintiffs who can show that they would be injured by  
5 unlawful government conduct in the future should  
6 ordinarily be able to get a judicial order decreeing that  
7 that not take place. But plaintiffs are not ordinarily  
8 entitled to receive money damages from the Government for  
9 wrongs committed against them.

10 QUESTION: And I take it you're - you're saying  
11 here - and they're not here because there's a further  
12 requirement of actual damage before they get money.

13 MR. STEWART: That - that's right.

14 QUESTION: Yeah.

15 MR. STEWART: That the damages provisions  
16 restricts the availability of monetary relief to a person  
17 entitled to recovery, and the phrase, person entitled to  
18 recovery, is most naturally construed to mean someone who  
19 has not only established a violation of law, but who has  
20 established the prerequisites to an award of compensatory  
21 relief.

22 QUESTION: Why - why did they put that phrase,  
23 entitled to recovery, in there in addition to actual  
24 damages? I'll be candid with you that I - I was thinking  
25 that maybe they put it in there because they anticipated

1     this - this category of cases like emotional damage  
2     without physical manifestations is non-compensable, and  
3     that - and that they were trying to leave open that kind  
4     fo a condition.

5             MR. STEWART: One - one hypothesis as to why the  
6     phrase may appear as it does. The phrase originated in  
7     the Senate version of the legislation, and the Senate  
8     version said that a plaintiff who establishes a will - an  
9     intentional or willful violation can collect actual or  
10    general damages, but a person entitled to recovery shall  
11    receive no less than \$1,000. And so, in the context of  
12    that provision, the phrase, person entitled to recovery,  
13    could be a shorthand for person entitled to recover either  
14    actual or general damages.

15            QUESTION: Well, he is entitled to recover actual  
16    damages if he has any.

17            QUESTION: Yeah.

18            MR. STEWART: But that -

19            QUESTION: And he's entitled to recover it if he  
20    doesn't have any. He's entitled to recover it, whether he  
21    has some or whether he doesn't have some. So I will - I  
22    don't understand, you say the most natural meaning of a  
23    person entitled to recovery is a person entitled to  
24    recovery who actually has actual damages. That isn't how  
25    I'd normally read it. I'd - I'd read it somebody who's -

1     who's entitled to get it if he has it.

2                 QUESTION: Well, I guess that's the issue.

3                 QUESTION: Yeah, that is the issue. So I just  
4     want you to explain a little bit more -

5                 (Laughter.)

6                 MR. STEWART: I mean, I think - I think -

7                 QUESTION: - about why that's the most natural  
8     reading.

9                 MR. STEWART: I mean, the more - I think the more  
10    natural reading is that a person entitled to recovery is  
11    someone who not only has established some of the  
12    prerequisites to an actual recovery, namely a compensatory  
13    award, but who has established all of them. And if the  
14    only compensatory relief available is actual damages, then  
15    a person who hasn't established actual damages is not  
16    entitled to recovery.

17                But even if a plausible argument could be made  
18    the other way, then the canon of construction that waivers  
19    of sovereign immunity are to be construed narrowly would  
20    compel the Court to read it in - in the narrow way.

21                QUESTION: Well, plus - plus the canon that -  
22    that you don't give words a meaning that renders them  
23    totally superfluous.

24                MR. STEWART: That - that's -

25                QUESTION: And if it means what Justice Breyer

1 suggests, you can just leave out the words, a person  
2 entitled to recovery.

3 MR. STEWART: Or - or -

4 QUESTION: Just read it, but in no case shall he  
5 receive less than the sum of 10,000, of \$1,000.

6 MR. STEWART: That's correct. If - if Congress  
7 had intended that any plaintiff who established an adverse  
8 effect from a willful or intentional violation would  
9 automatically receive at least \$1,000, it could have used  
10 the word person or individual or complainant, which was -  
11 which were the words that Congress used elsewhere in the  
12 Privacy Act to describe the individual whose rights had  
13 arguably been violated.

14 QUESTION: Or just - just drop entitled to  
15 recovery.

16 MR. STEWART: Exactly.

17 QUESTION: Shall a person receive less than the  
18 sum of -

19 MR. STEWART: And the other point I would - we  
20 would make in following up on one of Justice -

21 QUESTION: Mr. Stewart, if - and before going to  
22 the words of the statute, this - there are any number of  
23 statutes that have actual damages and it can say, or the  
24 statutory damages, and some of them have this formula,  
25 actual damages and person entitled to recover, and then

1     there's shades in between. Do you - do you really think  
2     that Congress, by using those different formulas, meant a  
3     different result in what would seem to be cases that don't  
4     - are not sensibly distinguished?

5             MR. STEWART: I mean, I think - I think we have  
6     to infer that Congress or presume that Congress meant  
7     something by the choice of words that it used. And the  
8     phrase entitled to recovery is -

9             QUESTION: A benign fiction, right?

10            MR. STEWART: A benign fiction, that's right.  
11     And I think it is also the cause that the phrase, person  
12     entitled to recovery, is used very rarely in the United  
13     States Code. There are a number of provisions along the  
14     lines of actual damages or \$1,000, whichever is greater,  
15     references to statutory damages or liquidated damages.  
16     But the phrase, person entitled to recovery, is very rare  
17     and we would presume that Congress intended something  
18     specific -

19            QUESTION: All right. I - I would - rather than  
20     do the presumption of what they intended deduced from  
21     canons, et cetera. You assume that it is ambiguous. You  
22     certainly got me there. I'm - I see it's ambiguous. And  
23     I also believe that Congress did not want to bankrupt the  
24     Treasury, destroying Medicare, Social Security, and every  
25     other programs we give \$1 trillion in damages to people



1     who have the social - I - I - you've got me there.

2                 Now, how do - what they - what your opponents  
3     say is that is a made-up problem. It doesn't - it isn't  
4     going to happen, and the reason it isn't going to happen  
5     is because these words, intentional or willful, are not  
6     used, the word intentional, as it normally is. It's used  
7     in a very special way so that they have to almost - well,  
8     you've - now, you've - I'm cross-referencing our earlier  
9     argument and I'm at a dilemma here because it's not  
10    argued, I don't know how to deal with it, but it seems  
11    relevant to the underlying question that is moving me  
12    about what Congress intended.

13                MR. STEWART: The petitioner is correct that the  
14    phrase intentional or willful has been construed by the  
15    lower courts essentially as a term of art, and the  
16    prevailing test in the lower courts is whether the agency  
17    exhibited flagrant disregard for -

18                QUESTION: Oh, I'm sorry. The lower court thing  
19    that we've looked up uses an or about that, and one of the  
20    parts of the or is without grounds for believing the  
21    action to be lawful, which means that part of the test,  
22    that if we have an ALJ, or we have people in the agency,  
23    just never think about it, as they might not in this case,  
24    that that cover - is covered by intentional or lawful.  
25    And that's one of the problems I'm having, because it

1 makes me think that that word intentional is a pretty  
2 complicated issue, which isn't argued. It seems to be  
3 very important, and I don't know what to do.

4 MR. STEWART: I - I think, with respect to the -  
5 the language from the court of appeals' opinion that you  
6 quoted, the without grounds to believe that -

7 QUESTION: I have three of them like that.

8 MR. STEWART: Right. I - I think what the courts  
9 are getting at is something at least akin to the standard  
10 that would prevail in a Bivens action, where an individual  
11 Federal officer was sued, where the question would be,  
12 could a reasonable officer in this person's position have  
13 believed that what he was doing was legal? Probably the  
14 courts have applied it in a - in a manner that's slightly  
15 more deferential to the Government.

16 In - in - it doesn't mean, however, that the  
17 Government has to have been shown either to have  
18 intentionally violated the law or to have intentionally  
19 sought to bring about harm to the plaintiff.

20 QUESTION: Do we have to decide that in this  
21 case?

22 MR. STEWART: No, no, I don't think you need to  
23 decide that.

24 QUESTION: I'd like a lot more argument on it  
25 before I decide that question.

1 MR. STEWART: That - that's correct.

2 QUESTION: Why -

3 QUESTION: And some briefing on it.

4 MR. STEWART: As the case comes to this Court,  
5 both parties are in agreement, or neither party contests  
6 the proposition that an intentional or willful violation  
7 was established.

8 QUESTION: Mr. Stewart, what has happened in the  
9 28-some years that this has been in effect concerning the  
10 amount of recoveries against the Government?

11 MR. STEWART: I - I would candidly acknowledge we  
12 have not had a problem with enormous recoveries against  
13 the Government up to this point.

14 QUESTION: What happened in the 1990 lawsuit you  
15 refer to on mailing of IRS form - form 1040s, that had a  
16 Social Security number and the name.

17 MR. STEWART: That - that was -

18 QUESTION: What happened to that case?

19 MR. STEWART: That was ultimately dismissed on  
20 the ground that the Social Security numbers were not  
21 records, which is contrary to the general course of the  
22 law, which is that Social Security numbers would be - be  
23 records. I - I want to be careful about this because we  
24 are not arguing that exorbitant liability would inevitably  
25 follow from a loss in this case. What we are saying is,

1 if we lose this issue and if the word adverse effect is  
2 given the same meaning in the Privacy Act that it has in  
3 the APA, the Government would be subject to enormous  
4 potential liability.

5 To take an example, following up on one of  
6 Justice Breyer's questions, as - as you pointed out, the  
7 Privacy Act is not limited to a prohibition on unlawful  
8 disclosures. It contains a range of other provisions that  
9 could be best be described as technical or even  
10 bureaucratic. One, for instance, is that when the  
11 Government collects information from private individuals,  
12 it has to identify, among other things, the source of  
13 authority, either a U.S. Code provision or an executive  
14 order that authorizes the information to be collected.

15 And if an agency circulated 100,000 forms and  
16 left off the U.S. Code cite, I think, under ordinary APA  
17 standards, any person who returned information on that  
18 form would be - would suffer an adverse effect, because he  
19 would have been deprived of -

20 QUESTION: Yeah, but that won't hurt you if - if,  
21 in fact, to show liability here, you have to show that the  
22 agency officials who made up that form knew - let's make  
23 it really tough - knew that leaving it off was command -  
24 putting it on was commanded by the act and they say, ha ha  
25 ha, I know it's commanded by the act, but I'm not going to

1 do it.

2 MR. STEWART: I mean -

3 QUESTION: Now, that'll be pretty rare and the -

4 MR. STEWART: It would be rare.

5 QUESTION: So the -

6 MR. STEWART: Well, you could - you could imagine  
7 a situation, and we wouldn't condone this - this conduct,  
8 but you can imagine a situation in which an agency  
9 official gets back the 100,000 forms from the printer and  
10 says, oh my gosh, the U.S. Code cite was left off, but  
11 then decides, I know we're supposed to do this, but I'm  
12 not going to reprint 100,000 forms for something like  
13 that, let's circulate them. We don't condone that  
14 behavior. It would be a violation of law, but it's hard  
15 to imagine that Congress would have intended that  
16 everybody who fills out information on those forms would  
17 then be entitled to \$1,000.

18 QUESTION: Just to try to get this issue out of  
19 the case, are you content to have us decide this case on -  
20 on the assumption, just for the sake of argument but  
21 without ruling, that - that the act requires willfulness  
22 in the - in the most extreme sense that Justice Breyer  
23 describes? Are you willing to have us decide the case on  
24 that assumption?

25 MR. STEWART: Yes.

1                   QUESTION: You're willing to have us decide what  
2 was not - what it was over, that there is an adverse  
3 effect? In fact, the - the Government didn't dispute  
4 that, didn't dispute adverse effect, did it?

5                   MR. STEWART: Not - not as to Buck Doe. The -  
6 the magistrate judge held that each of the plaintiffs had  
7 established an adverse effect simply by release of the  
8 Social Security numbers, and the district court didn't  
9 expressly endorse that view, but didn't reject it either.

10                  QUESTION: Is it your - is it your argument - and  
11 I'm glad we're back to the statute - that in order to  
12 determine in this case, in this case, whether there was a  
13 cause of action, you had to read beyond the adverse effect  
14 clause and go down to for - or before - and decide also  
15 whether there was actual damages, before there was a cause  
16 of action?

17                  MR. STEWART: You - you wouldn't have to decide  
18 whether there was proof of actual damages, but yes, I  
19 think if it was apparent on the complaint that there was  
20 an adverse effect but no possibility of proving actual  
21 damages, then the suit shouldn't be - shouldn't go  
22 forward, but -

23                  QUESTION: That - that's an - that's an unusual  
24 way to write the statute. It's unusual to - to write the  
25 statute in a way where I don't know if I have a cause of

1 action until I get down to where the damages are defined.

2 MR. STEWART: I - I agree, but I think it would  
3 be -

4 QUESTION: Usually I would say that any person  
5 injured is the way we would expect this statute to have  
6 been written.

7 MR. STEWART: I agree, and it may be that to -  
8 Congress anticipated that questions concerning damages  
9 would be resolved at the end of the day, and there would  
10 obviously be a lot of cases in which a plaintiff would  
11 allege damages at the outset, and therefore, would have a  
12 cause of action, but if he failed to prove damages in the  
13 - the course of the trial, he wouldn't be entitled to the  
14 \$1,000, even if he proved that he suffered an adverse  
15 effect from a willful or intentional violation.

16 QUESTION: But Mr. Stewart, I - I take it that  
17 even - even if there was no indication of actual damage,  
18 the - by - by pleading the violation of the statute, he  
19 would at least have pleaded enough to entitle him to - to  
20 ask for a - to ask for equitable relief.

21 MR. STEWART: We would say that equitable relief  
22 is not, in this context, is not specifically authorized by  
23 the Privacy Act. But we would say that equitable relief  
24 would be available under the APA, and the allegation would  
25 be that the -

1 QUESTION: Okay.

2 MR. STEWART: - agency's action was not in  
3 accordance with law -

4 QUESTION: I - I see.

5 MR. STEWART: - because it violated the Privacy  
6 Act.

7 QUESTION: May -

8 MR. STEWART: So - so - and indeed, this suit at  
9 the outset included a request for injunctive relief  
10 against further disclosures, and the Government settled  
11 that part of the case with lightning speed. There was -  
12 the - the plaintiff did obtain a judicial order directing  
13 the Government not to continue with its practice.

14 QUESTION: So indeed there's - there - there's  
15 nothing bizarre about letting him get into court just on  
16 the basis of - of an adverse effect, because he can win in  
17 court on the basis of an adverse effect, not by reason of  
18 this act alone, but by reason of the obligations under  
19 this Act plus the APA.

20 MR. STEWART: That's correct.

21 QUESTION: Right.

22 QUESTION: May I - may I go to another issue? I  
23 mean, one of things that's bothering us is several issues  
24 that seem crucial, which we're just having to make  
25 assumptions about here, and depending on the assumptions,



1 the scope of liability may - may be enormous.

2 Here's the one that is bothering me. The - the  
3 Government is not contesting here that in fact there -  
4 there was some kind of actual damage, even though it was  
5 not quantified.

6 MR. STEWART: No, I think we are contesting that.

7 QUESTION: Well, I - but - but you're not  
8 contesting the fact - let me put it - I - I misspoke -  
9 you're not contesting the fact that if he showed emotional  
10 damage and emotional damage alone, no physical effects,  
11 that that would be enough for recovery if - if a fact-  
12 finder said, well, I think the emotional damage is worth  
13 \$250 -

14 MR. STEWART: No, no. We - we're contesting  
15 that and -

16 QUESTION: You are contesting that?

17 MR. STEWART: It hasn't really been -

18 QUESTION: Are - may - may I ask you just a  
19 further question, then you can tell me which - whatever  
20 you want. Are you contesting as a matter of law the  
21 sufficiency of this plaintiff's testimony to at least get  
22 to the fact-finder on whether there was actual damage? He  
23 testified - I forget his exact words - but he testified,  
24 you know, I was so upset when I heard that they had  
25 released my Social Security number, I just didn't know

1     what to do or what to say, something like that. Are you  
2     contesting the sufficiency of that evidence to put an  
3     issue of actual damage to the fact-finder?

4             MR. STEWART: Yes, and let me backtrack for a  
5     second to say that the Fourth Circuit decided that Mr. Doe  
6     had not proved actual damages, and the petitioner did not  
7     seek this Court's review of that holding, so -

8             QUESTION: But they said he didn't prove actual  
9     damages because there was no physical effect.

10            MR. STEWART: That - that's right. There was -

11            QUESTION: They didn't say that, as a matter of  
12     law, if you don't have the emotional physical effect rule,  
13     he wouldn't have had enough to - to get to the fact-finder  
14     an actual damage.

15            MR. STEWART: That - that's correct. My - my  
16     only point was, the reason we haven't briefed the question  
17     of whether there were in fact actual damages is that our  
18     understanding is that, because petitioner didn't seek this  
19     Court's review of that aspect of the - the court of  
20     appeals' holding, as the case comes to the Court, we're  
21     assuming that there were no actual damages.

22            QUESTION: And you didn't - you didn't cross?

23            MR. STEWART: But - but to answer your - your  
24     question about what the Government's position on the law  
25     is, our - our first argument is that in the context of

1     this specific statute, the phrase actual damages refers  
2     only to pecuniary harm, and we've cited in a footnote a  
3     conflict among the circuits with respect to that question,  
4     and that - that isn't presented by this case.

5             QUESTION: Okay.

6             MR. STEWART: But we would -

7             QUESTION: Mr. Stewart, may I ask you a question  
8     with respect to that? Suppose this Doe said, I'm very  
9     concerned about the impact of this on my credit rating, so  
10    I'm going to spend \$10 to a credit - credit reporting  
11    company to find out whether there's been any theft of my  
12    identity, \$10. Would there then be a claim under this  
13    statute for actual damages?

14            MR. STEWART: I mean, there - there would be a  
15    question of whether that was - whether there was  
16    causation, whether that was a reasonable response to the  
17    threat, but in theory, an expense like that could qualify  
18    as pecuniary harm and, thus, is actual damages.

19            QUESTION: But it made - it made me think that if  
20    there's ambiguity in this statute, that wouldn't have made  
21    much sense for Congress to write a statute like this  
22    where, to meet the actual damage requirement, all you have  
23    to do is make a \$10 expense.

24            MR. STEWART: I mean, I agree that it's a  
25    somewhat anomalous result that the availability of the

1 thousand can turn on a relatively small pecuniary loss.  
2 It's - it's somewhat analogous at least to the common law  
3 rule that punitive damages are available only to a  
4 plaintiff who's shown some level of compensatory damages,  
5 and there also a plaintiff might be able to contrive a  
6 small loss that is compensable, and thereby make himself  
7 eligible for punitive damages that far exceed the amount  
8 of -

9 QUESTION: But it's not just not contrived,  
10 because now it's a formula for - for all the people who  
11 have this kind of complaint, so I think if that's what -  
12 what the line is, then Mr. Doe, is it, all the future Mr.  
13 Does will ask to have their credit checked.

14 MR. STEWART: I mean, we would still want to - we  
15 would still have to know whether that was in fact a  
16 reasonable response to what the Government had did - done  
17 - and what the - the threat that it posed to the - the  
18 plaintiff. And even if that kind of machination might be  
19 possible in in one category of cases, it would still not  
20 be possible in a lot of other categories of potential - of  
21 Privacy Act violations.

22 To continue with my answer to Justice Souter's  
23 question, the - the second thing we would say about the  
24 emotional injury is that, even if some emotional harms  
25 were compensable as actual damages under the statute, we

1 don't think that the particular emotional harm alleged  
2 here would be, because a Social Security number, unlike,  
3 for instance, intimate details about a person's family  
4 life, is not inherently private or secret or confidential.  
5 It's not the sort of information that would cause a person  
6 to say, I would be horrified to think that somebody else  
7 knew that even if I could be sure that that person wasn't  
8 going to misuse it against me.

9           The - the reason that people are worried about  
10 release of Social Security numbers is that that release  
11 may lead to some further, more tangible harm, identify  
12 theft or -

13           QUESTION: So you're saying as a matter of law,  
14 this is just what he testified to is simply too de minimis  
15 to be considered evidence -

16           MR. STEWART: That -

17           QUESTION: - sufficient evidence.

18           MR. STEWART: That's correct. And we've cited  
19 the Metro-North case in our brief, and I think that the  
20 harm - the emotional harm that he's alleged is really -  
21 really very similar to the fear of cancer as a result of  
22 asbestos exposure that was held not to be compensable in  
23 the absence of some current physical impairment.

24           So to - to - follow up on this and make our  
25 position absolutely clear, we are saying that if the term

1 adverse effect is given its usual meaning, and every  
2 plaintiff who establishes an adverse effect from a willful  
3 or intentional violation is entitled to \$1,000, that the  
4 potential financial consequences would be enormous. Now,  
5 I would say in all candor that if we lose this case, it's  
6 quite possible that the Government would argue in the  
7 lower courts that to protect the public fisc, the - the  
8 phrase adverse effect should be given a narrower  
9 construction under this statute than under the APA. But  
10 our basic point is -

11 QUESTION: May I ask, with respect to the parade  
12 of horrors that we're confronted with, is it - it's my  
13 understanding that there are several other statutes under  
14 entirely different statutes, they have the similar  
15 provision but they're clearly worded in a way that says,  
16 if you get anything, you'll get the minimum, and - but  
17 it's the position that your opponent contends is the  
18 proper reading of that statute. There are several such  
19 statutes, am I -

20 MR. STEWART: There are a lot of statutes with  
21 wording, for instance, to the effect of a plaintiff who  
22 establishes a violation will receive actual damages or  
23 \$1,000, whichever is greater. Most of those don't apply  
24 to suits against the United States -

25 QUESTION: And - and -

1 MR. STEWART: - but there are many such laws.

2 QUESTION: And most of those would not require  
3 proof of actual damages?

4 MR. STEWART: That's correct. Under the plain  
5 terms of the statute, the plaintiff would get the 1,000 -

6 QUESTION: Why in your view did Congress come up  
7 with a different formula in this case than it has in that  
8 - in the pattern of statutes that those represent?

9 MR. STEWART: I'm - part of it may be that most  
10 of those statutes are not dealing with suits against the  
11 United States, and Congress may be more protective of the  
12 public fisc, and part of it is the - the legislative  
13 debates reveal that Congress considered a variety of  
14 potential damages provisions, some of which were more  
15 generous than the one that was ultimately enacted, some of  
16 them less generous. For instance, the more generous  
17 provisions -

18 QUESTION: But this statute is unique, is it not?

19 MR. STEWART: It's not quite unique. I believe  
20 there are a couple of other provisions that use the  
21 phrase, person entitled to recovery, and that phrase has  
22 not been authoritatively construed by this Court, so those  
23 - interpretation of those statutes would raise the same  
24 question this one does.

25 QUESTION: But there's a number of them that

1 start out with actual damages.

2 MR. STEWART: And - and sometimes, again, the  
3 words are to the effect of actual damages or \$1,000,  
4 whichever is greater. And because the availability of the  
5 \$1,000 is not limited to a, quote, person entitled to  
6 recovery, unquote, the plain language of many of those  
7 statutes compels the conclusion that \$1,000 will be  
8 awardable regardless of actual damages.

9 QUESTION: Now, there was an interpretation -  
10 Congress told OMB to do interpretive guides, and it did,  
11 and it - and it gave it the meaning that this plaintiff  
12 gives it. It's - it read the statute - didn't - wasn't  
13 that what OMB said? Wasn't that their contemporaneous -

14 MR. STEWART: I mean, I think the more - I think  
15 you're right that the more natural reading - the OMB  
16 guideline didn't address in terms the situation where a  
17 plaintiff shows no actual damages but nevertheless claims  
18 the thousand, but the OMB guideline did say, a person who  
19 suffers an adverse effect from a willful or an intention  
20 violation shall receive a 1,000 - actual damages or  
21 \$1,000, whichever is greater.

22 QUESTION: It said actual damages or 1,000. As I  
23 understood the - that original interpretation, it was the  
24 reading that the plaintiff is putting forward here and  
25 your response to it in your brief seemed to be that was a



1 wrong interpretation because it didn't take account of  
2 sovereign immunity or saving the sovereign fisc and an  
3 official at OMB said it was wrong and it's not - no longer  
4 effective.

5 MR. STEWART: I mean, I think if - if plaintiffs  
6 are using the OMB interpretation to establish the point  
7 that intelligent people can read the statute the way that  
8 they did, I - I think it's validly used for that purpose.  
9 But the OMB guideline is not entitled to deference, as the  
10 Court held in Adams Fruit, a statutory provision that is  
11 to administered solely by the courts is not one as to  
12 which the Court will defer to administrative  
13 interpretations. The - the OMB -

14 QUESTION: But didn't - didn't Congress designate  
15 OMB to - to these guides?

16 MR. STEWART: Congress designated OMB, but it's -  
17 the particular provision that is at - specifically at  
18 issue is reprinted at page 13a to the appendix to the  
19 Government's brief. And it says, the director of the  
20 Office of Management and Budget shall develop and, after  
21 notice and opportunity for public comment, prescribe  
22 guidelines and regulations for the use of agencies in  
23 implementing the provisions of this section.

24 So the only specific directive that OMB had was  
25 to instruct or direct agencies as to their substantive

1 obligations under the act. Now, in the course of doing  
2 that, it was entirely appropriate for OMB to go further  
3 and offer its view to the agencies as to what consequences  
4 would follow if they breached their substantive  
5 obligations, but that wasn't a task that was specifically  
6 entrusted to OMB by statute, so I don't think there's any  
7 basis for inferring that Congress -

8 QUESTION: I see. You're - you're saying that -  
9 that it - it was meant just to tell the agencies what you  
10 have to do to comply with the act.

11 MR. STEWART: Exactly.

12 QUESTION: Yeah, that - that's probably the best  
13 reading of it.

14 MR. STEWART: Exactly.

15 QUESTION: Yeah.

16 MR. STEWART: So the - the last - the last point  
17 I wanted to make is, it might be possible, if - if we lost  
18 this case, it might be possible to mitigate the financial  
19 consequences to the Government by giving the term adverse  
20 effect a narrow construction, but our - our view is, if  
21 the consequence of adopting plaintiff's reading of the  
22 phrase person entitled to recovery is that an established  
23 term of art like adverse effect has to be construed in  
24 other than its normal manner in order to make the statute  
25 make sense, there's something wrong with plaintiff's

1 reading.

2 QUESTION: But why - why do you say that?

3 Because, see, the adverse effect part governs people who  
4 don't even want damages. I mean, it - it's to get into  
5 court, it's just to get into court, bring the suit, isn't  
6 it?

7 MR. STEWART: Right.

8 QUESTION: So - so I would have thought that your  
9 - your reaction - I just want you to clarify this - would  
10 be, if they win this case, then the reaction would be to  
11 go back and say, all right, if we're going to give \$1,000  
12 to people who really are just feeling bad about what  
13 happened, we've got to give them all \$1,000, well, it's  
14 only in circumstances where the agency really did  
15 something quite wrong. And so you'll read that  
16 intentional or willful requirement toughly, not - not the  
17 adverse effect part tough. I mean, why - why wouldn't  
18 that be the reaction?

19 MR. STEWART: I mean, I guess if - if this - if  
20 this Court held that the phrase intentional or willful was  
21 limited to situations -

22 QUESTION: I don't see - yeah?

23 MR. STEWART: If it - if it was limited to  
24 situations in which the Government set out to violate an  
25 individual's rights under the Privacy Act, that - that

1 would be another way at least of -

2 QUESTION: Yeah, yeah, and then you'd say, well,  
3 we should assume that's what happened here, though. It  
4 certainly didn't -

5 MR. STEWART: I - I mean -

6 QUESTION: - but we should assume that. Now,  
7 suppose I assume that, and then I decide that they're  
8 right on the basis of that assumption, and then in the  
9 next case it turns out my assumption happened to be quite  
10 wrong because Congress had a broad intent there. Now what  
11 happens?

12 MR. STEWART: I mean, even under the narrowest  
13 possible interpretation of what intentional or willful  
14 means, you could have hypotheticals like the one with the  
15 form that left off the U.S.C. cite, and again, we - we  
16 hope those things would happen very rarely, but it seems  
17 highly unlikely that Congress would have wanted each of  
18 the hundred thousand people who put on - information on  
19 the form to get \$1,000. Thank you.

20 QUESTION: Thank you, Mr. Stewart.

21 Mr. Campbell, you have five minutes remaining.

22 REBUTTAL ARGUMENT OF MR. JACK W. CAMPBELL, IV

23 ON BEHALF OF THE PETITIONER

24 MR. CAMPBELL: Thank you, Mr. Chief Justice.

25 Justice Kennedy, I'd like to address my first

1 point to you, because I - I think you put your finger on  
2 one of the number of - of absurd results, or difficult-to-  
3 swallow results that flow from accepting the Government's  
4 interpretation. The Government's essential contention  
5 here is that quantification of actual damages is an  
6 essential element of a Privacy Act claim, but boy, what a  
7 strange way to write the statute if that's what Congress  
8 intended.

9           The - the relative language is reproduced at  
10 pages 3 and 4 of petitioner's brief, and it says that  
11 whenever an agency fails to comply with any other  
12 provision of this section, and I'm going to ellipsis, in  
13 such a way as to have an adverse effect on an individual,  
14 the individual may bring a civil action against the  
15 agency, and I'm putting another ellipsis there. You then  
16 go to subsection (g)(4), which states that if that adverse  
17 effect was the result of an intentional or willful  
18 violation, then the Government, the United States shall be  
19 liable, in the sum - in an amount equal to the sum of.

20           Liability is established once those three  
21 prerequisites are met. All that is left at that point is  
22 an exercise of arithmetic. It would be a very strange  
23 statute that says the United States shall be liable in the  
24 sum of the following amounts you are to add up, and that  
25 amount would be zero. And, in fact, that would never be

1 the case. Costs are always available to a Privacy Act  
2 plaintiff who establishes an adverse effect caused by an  
3 intentional or willful violation of the act.

4 So there are certainly going to be at least some  
5 recovery. There's no qualification of the costs award  
6 with reasonableness of precondition of actual damages. So  
7 some - there is going to be a recovery in those cases.  
8 Now, if that's the only recovery that's available, it's a  
9 very - it's, one, a very strange statute, and number two,  
10 a statute that arguably is unconstitutional. But you  
11 don't need to read it that way, because the natural  
12 reading is, as was pointed out in the argument, that, yes,  
13 Congress did anticipate precisely this issue, that privacy  
14 invasions very typically result in emotional harms that  
15 inherently are not quantifiable, and Congress didn't  
16 intend, I can't imagine, to - to make the line of recovery  
17 turn on whether you can prove that you put 37 - a 37-cent  
18 stamp on an - on an envelope to get your credit report or  
19 pay the \$10 fee. That's a very arbitrary line. Why would  
20 Congress be solicitous of people who suffer the same harm  
21 - be solicitous of the one who put a stamp on an envelope?  
22 That's a nonsensical.

23 Moreover, it reduces any efficiency savings that  
24 are realized under the act as Congress intended by saying,  
25 look, we're not going to get into those sorts of proof

1 issues. If you have an emotional distress and it's  
2 typical, it's caused by the intentional violation, we  
3 don't go through that. You get your damages of \$1,000 and  
4 let's not go through the proof. That's a very natural  
5 reading of the act.

6 But the Government - the Government is asking  
7 you to adopt a - an interpretation that has a number of  
8 additional problems. It renders the adverse effect  
9 requirement superfluous. Proof of actual damages will  
10 necessarily in every case require proof of an actual harm  
11 and causation. So even the attempt by the Government to  
12 place a - a meaning on the adverse effect requirement must  
13 fail. Again, it turns the shall language into may, or at  
14 best, renders shall illusory, because the sum would be  
15 zero in much cases.

16 QUESTION: As to your point about the - the  
17 costs. You don't get costs unless, it says the court may  
18 assess reasonable attorneys' fees and other litigation  
19 costs reasonably incurred in any case in which the  
20 complainant has substantially prevailed. And I assume  
21 that when later on they - they say the costs of the action  
22 together with reasonable attorneys' fees as determined by  
23 the court, they're referring back to the court has allowed  
24 those - those costs and fees, because he has substantially  
25 prevailed?

1           MR. STEWART: I'm sorry, Justice Scalia. I - are  
2 you referring to the language that's in (g)(2) and (g)(3)  
3 of the statute?

4           QUESTION: Yes, I am.

5           MR. STEWART: (g)(2) and (g)(3) are entirely  
6 different causes of actions. Those deal with requests for  
7 injunctive relief, and this is the only type of injunctive  
8 relief under the Privacy Act, injunctive relief for access  
9 to files or correction of files. Those are separate  
10 causes of action. In fact, I submit, Justice Scalia -

11          QUESTION: I see. I see what you're saying.

12          MR. STEWART: - that the contrast in the language  
13 between (g)(2) and (g)(3) -

14          QUESTION: I see what you're saying.

15          MR. STEWART: - and (g)(4) proves my point.  
16 Here, Congress anticipated that there is a substantial -  
17 substantially prevailing party. That party -

18          QUESTION: Well, what assumption would you like  
19 us to make -

20          QUESTION: Right, right.

21          QUESTION: - in respect to the meaning of  
22 intentional or willful?

23          MR. STEWART: I - I submit that a perfectly  
24 proper interpretation of intentional or willful can  
25 include conscious disregard of - of the - of the legal



1 obligations. That's a well-established standard.

2 Thank you.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

4 Campbell. The case is submitted.

5 (Whereupon, at 11:57 a.m., the case in the  
6 above-entitled matter was submitted.)

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